Secondary Legislation Scrutiny Committee

Corrected oral evidence: Government consultation

Tuesday 20 March 2018
3.55 pm

Watch the meeting

Members present: Lord Trefgarne (The Chairman); Baroness Blackstone; Lord Faulkner of Worcester; Baroness Finn; Lord Goddard of Stockport; Lord Haskell; Lord Janvrin; Lord Kirkwood of Kirkhope; Baroness O’Loan; Lord Sherbourne of Didsbury; Baroness Watkins of Tavistock.

Heard in Public Questions 1 - 14

Witnesses

I: Oliver Dowden CBE MP, Parliamentary Secretary, Cabinet Office; John Fiennes, Director and Deputy Head of Economic and Domestic Affairs Secretariat, Cabinet Office.

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Examination of witnesses

Oliver Dowden CBE MP and John Fiennes.

Q1  **The Chairman:** Minister, good afternoon. Thank you very much for coming. We are very grateful to you. Mr Fiennes, we are very glad to see you, too. Thank you for coming.

You probably know the background to all this. It all started with Oliver Letwin several years ago now. I am bound to say that we are a touch disappointed with the way things have developed since, but maybe a new era is about to dawn. If you would like to make a little opening statement, that would be absolutely fine.

**Oliver Dowden:** It is a pleasure to be before you to talk about this issue. I am the newly appointed Minister in the Cabinet Office and I am partly here representing the Minister for the Cabinet Office, David Lidington.

I have had a look through what has happened in this area. I know there was a terribly long delay in getting back to you in relation to some of this correspondence, so may I apologise on behalf of the department for that delay?

There has also been a delay in putting these revised consultation principles on to our website and being clear that we endorse the revised consultation principles. When I discovered that, I asked officials to put that information online and I can confirm now that those revised principles are online and available for everyone to see.

I am very happy to answer any further questions, but I just wanted to make that clear at the start, because I know those are two areas of concern.

Q2  **The Chairman:** That is very helpful. We have a number of questions that we would like to put to you, which different colleagues will put. I will ask the first question.

As you now well know, in January 2016, Oliver Letwin said that the Cabinet Office would “undertake the monitoring and improvement of consultations on an ongoing and case-by-case basis”. However, the report that Mr Ben Gummer sent to us in February 2017 disclaimed all that. I have something else to say in a minute, but, first, why did the purpose of the Cabinet Office report change over that period? What role does the Cabinet Office now see for itself in relation to consultation practice in government departments?

**Oliver Dowden:** As to why it changed, as you know, any new Minister coming into role has the opportunity to review the policies that he inherits. He took the decision, as set out in the letter, that he did not think it would be appropriate for the Cabinet Office to have that role. He has now been succeeded by David Lidington as the Minister for the Cabinet Office and to a certain extent by me as a Minister in the Cabinet Office. Both David and I have reviewed the decision that he took and support it. Perhaps you will allow me to outline the reasons for that, which relate to your second question.
The role of the Cabinet Office is to support other departments and to facilitate cross-government working, but the principal responsibility for activities lies with each department. In furtherance of that relationship, the Cabinet has sought to support effective consultations. Last year, for example, we introduced a number of different measures that address this point. Please bear with me briefly as I outline some of them.

The first, and the most significant, is that we have insisted that each department appoints a senior responsible officer and a Minister responsible for monitoring secondary legislation. They are responsible primarily for making sure that the consultations are conducted in good order and for enforcing the principles that are agreed for the consultation.¹

Secondly, they feed into a secondary legislation monitoring board, which monitors 5% of Explanatory Memoranda per quarter. The board looks at consultations and Explanatory Memoranda and determines whether they have been conducted in effective fashion. The results of that are then fed into improved learning in the Civil Service, and indeed the results will also be fed to your Committee.

Given that the role of the Cabinet Office is to convene and bring together departments, and to improve learning between departments, the Cabinet Office having that supportive role is a better way of conducting things. Indeed, that has been added to by various measures, which I shall not outline now but which we may come on to later, to improve the education of standards in consultation processes. All the way through that, there is constant reference to these principles.

The Chairman: Thank you very much for that. Before I ask Lady Finn to ask our next question, I am reminded that I need to remind our visitors that, in case of fire, there will be a voice-activated alarm. Any bells are Division Bells. Should there be an incident, please follow the clerk’s instructions. This is a formal evidence-taking session. It is on the record and is being webcast on audio only. A verbatim note is being taken, which will be put on the public record in printed form and on the parliamentary website. We will of course send you a copy of the transcript for any amendment that you may wish to make.

I ought now to ask members of the Committee if they have any relevant interests to declare for the record.

Baroness O’Loan: I have a supplementary question. You just said that in September you decided that each department should have an SRO and a Minister responsible for secondary legislation, and that it would feed in quarterly results and would lead to improved learning. That was about six months ago. Has the committee met?

¹ The Cabinet Office has subsequently said that this sentence should read: “They are responsible primarily for making sure that the Explanatory Memorandums, including the reporting of consultations, are conducted in good order.”
Oliver Dowden: Yes. Forgive me. I should correct my evidence already, as I slightly misread from my briefing. The actual date for the introduction of this centralised monitoring was July, I believe. Is that correct? It was certainly last year. The answer to your question is, yes, it has met. It met in January and in March.

Baroness O’Loan: The results, you say, are forwarded to this Committee.

Oliver Dowden: Yes, that was the plan. Has the Committee received these? If it has not, I am happy to take that up.

The Chairman: I do not recall having seen them. You could take that up.

Oliver Dowden: I will, as a result, take that up. That was certainly the plan.

Baroness Finn: My question flows from that. When the Committee took evidence from Sir Oliver Letwin in January 2016, he said that he was committed to producing within a year the first of a series of annual reports on the consultation process. When Mr Gummer sent his first report in February 2017, it contradicted this and said that the Cabinet Office did not intend to regularly report on consultations across government. The first part of my question is this: can we expect a second report with the findings?

Oliver Dowden: I am afraid that the short answer is no, for the reasons set out in Ben Gummer’s letter, which has been endorsed by David Lidington and me. I am happy to answer in further detail as to why I think that is the appropriate course.

Baroness Finn: If it is, that is going back on what was committed to in the first place. There is a concern in government that it is very easy to announce a new initiative and to report on a first bit of progress, because that is always a bit quicker; the implementation is when it becomes really becomes difficult. I refer, for example, to the Talent Action Plan, published in 2015. We are still waiting for the 2017 report back on the difficult part. I know I am digressing, but it is important to have that continuity.

When Mr Gummer wrote his letter to say that this would not be happening, he finished it off by saying basically that a number of actions had taken by teams in the Cabinet to improve the consultation practice, and that, “While there will always be more that can be done to improve, and we will continue to actively raise capability in this area, I am satisfied that capability is improving and that government as a whole is engaging with the public in a timely, effective and open way”.

In the interests of evidence-based policy, where is the evidence to support the findings that you are satisfied if you are no longer going to give reports, et cetera, if there will be no second report, and if the undertaking has been

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2 The Cabinet Office has subsequently said that the date was November.
3 The Cabinet Office has subsequently said that the date was December.
gone back on?

**Oliver Dowden:** The principle is similar to the answer to my first question in that we view it as a supporting role. We are encouraging education as to standards and we are monitoring rather than producing an explicit report.

In relation to the evidence base, in the last year there were 748 SIs\(^4\). I believe, relying on what the Committee has picked up on, that in the Session to date you have only drawn one SI to our special attention. In 2016-17, you drew two out of 51 to our attention for inadequacies in the consultation process. Before that, it was five out of 67, and before that four out of 89. So I do not think the evidence base would support that there has been a deterioration. Arguably, it has got slightly better. I am not sitting before you and trying to claim that things have improved remarkably, but I do not think there is anything to suggest that it is getting worse.

We have taken the view that it is better to support departments. Clearly, departments have principal responsibility. It is not just civil servants in departments but Ministers in departments who have that responsibility. Certainly as a Minister in my own department I look very carefully at any consultation that we propose. Indeed, other Ministers will also scrutinise those consultations, albeit to a lesser extent, through processes such as the Cabinet committee write-rounds. Being on some of these Cabinet committee write-rounds, I also look at proposals for consultation as part of that. There are a range of checks and balances.

On balance, given the cost-benefit and the amount of resources involved, would it be better to use it to improve learning and communication of these standards, or would it be better to produce a report? We thought that at the moment it was better to have it the other way. If things change considerably and there is evidence that there has been a significant deterioration, that may change.

**Baroness Finn:** We were talking about consultations, not the SIs, and there has been a level of dissatisfaction with the consultation process. The departments in government are always very keen to take back their own control and do not like a centralised monitoring of standards. This means that some departments will be better than others and that the guidance can be insufficiently applied. It needs a fair amount of monitoring to make sure that every department reaches the best rather than going on its own merry way.

\(^4\) The Cabinet Office has subsequently said that the number of 748 is a reference to the number of government consultations published on the GOV.UK website in 2017 (not the number of statutory instruments).
Oliver Dowden: As I said, there is some monitoring through the Secondary Legislation Monitoring Board, on which the SROs for each department sit.\(^5\)

In addition, if you look across the piece, most departments now have had training on this. For example, we have conducted a “contented committee’s effective Explanatory Memorandum” workshop, which was attended by 168 civil servants from 20 departments. You may disagree with the approach, but the approach that we have taken is to support the extension and the learning of these principles across departments, rather than necessarily—I hesitate to say “marking their homework”—trying to hold them to account in a top-down fashion. We thought it was better to support them in a bottom-up fashion.

As I said, if we have evidence that there has been significant deterioration, we could revisit that.

The Chairman: The Explanatory Memoranda are of course crucial in all this.

Lord Haskel: I hear what you say about supporting the standards. What do you do if standards drop?

Oliver Dowden: If standards drop, the role of the monitoring board is then to focus in on areas where improvement is required and to get further training in those areas. It is about making sure that the civil servants involved are aware of the standards expected of them. As I said, if evidence was presented to me through this process, or indeed through the Committee, that we had seen a signal shift in standards, we would certainly review our approach.

However, it is probably best to proceed on the basis of encouragement and collaborative working. Then, within each department, the Minister will bear responsibility for consultations and SIs that are put out in his name, so that in each department the Minister will hold his officials to account and be held to account in Parliament, perhaps through Oral Questions. If the SI is subject to an affirmative procedure, it may well come up in this Committee. That is the division that we are working on.

Q4 Baroness Blackstone: Those of us who have worked in government either as either officials or as Ministers know very well that you can set up processes and structures, and they look absolutely fine on paper, but in fact they do not necessarily always produce the goods. They may at the beginning, but then people do not pay much more attention and get distracted by other things.

You have said that in each department there is both a Minister and an official responsible for secondary legislation. I do not know how much of their time they spend looking at secondary legislation and in particular at

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\(^5\) The Cabinet Office has subsequently said that this sentence should read: “As I said, there is some monitoring through the Secondary Legislation Monitoring Board, on which Grade 7 officials appointed by the SROs sit.”
the consultation process, but this Committee, on several occasions in the last couple of years, has had to send things back to departments because the consultation process has been flawed. It is obviously not working perfectly, but that might be asking rather a lot.

I know you are a relatively new Minister. Are you aware, or is it drawn to your attention, when this Committee sends something back to a department specifically because the consultation process has been inadequate for one reason or another?

**Oliver Dowden:** You may correct me on this, but I do not believe you have sent anything back since I have been a Minister, but I would be very interested to see that. In preparation for this Committee, I have looked into what happened in relation to a number of the SIs that you have sent back.

On the point that you raise, which Baroness Finn also raised to a certain extent—I saw she was nodding vigorously as you said it—there can be a tendency in any bureaucracy, for want of a better word, to become self-serving and go for the easier path. That is a challenge for the Cabinet Office, and it is why we are constantly pushing to improve standards and training.

Particularly when you have such a volume of SIs and Explanatory Memoranda, while you may aspire to perfection, it is unlikely you will get to perfection. There are challenges, but I genuinely do not feel that it has got significantly worse, certainly in the past two or three years. However, I am open to further evidence on this point.

**Baroness Blackstone:** It is a very low level of ambition just to say that you do not want things to get worse.

**Oliver Dowden:** Yes, indeed. Maybe I can come back on that. It is getting better, by and large. It is difficult to get objective information on this, but take your reports and the instruments that you have drawn to the special attention of the House on the ground of inadequacies in the consultation process. In 2014-15, you drew attention to 4.5% and then 7.5% in 2015-16. Since then, it has declined to 3.9% in 2016-17, and there has been one so far in this Session.

We are pushing all the time to improve those standards. In the past year or two, we have made a genuine effort to push out understanding of these principles through a range of activities, including workshops and courses. This forms part of policy training. In advance of this Committee, I asked the Government Digital Service to make sure that, whenever a consultation is uploaded, there is a prompt to the uploader to confirm that it complies with principles. We are constantly seeking to improve the process, so I hope you do not take there to be complacency.

The point I was making is that I am not convinced that it justifies producing an annual report.

**Baroness Blackstone:** It is always quite difficult for the Cabinet Office to
keep tabs on what all government departments are doing. I am not quite sure how you do it in this area other than have a monitoring board, which does not seem to meet very often. It was set up in July and it has just met once—in January, according to what you said. I am not saying that it should meet every week, but that is quite a low level of frequency for something of this sort.

What do you do if this Board comes up with any conclusions about which department is doing well and which is not doing so well? I am all in favour of your approach of encouragement, support and training, but occasionally naming and shaming is needed if you really want to bring up the standards of a government department’s work in this or any other area.

Oliver Dowden: It is a valid point. The monitoring board has met twice, in January and March, and the aim is that it will meet on a quarterly basis. I certainly take an interest in what comes out of that, and, as I said, I will ensure that it is shared with you.

The question of naming and shaming goes back to my original argument, which is that the Cabinet Office’s default position should be to support departments, and that the primary responsibility for responding to failures should be with the individual Ministers who are accountable to Parliament. If we came up with evidence that there was a problem with a specific department, I would get in touch with the responsible Minister. I intend to write to all the responsible Ministers after this session, once again to highlight to them the importance of the principles. I did not write before, because I wanted to hear your views and to see if there was anything else I should reflect in that correspondence.

Rather than naming and shaming, my preference would be to speak directly to the Ministers, highlight the problem and ask them to deal with it initially.

Q5 Lord Janvrin: This question follows on about the monitoring board. Who does it report to? If it reports on a quarterly or an annual basis, and you have volunteered to share those reports with us, say, on an annual basis, how is that different from having some kind of annual reporting process? The first question is: who does the Board report to?

John Fiennes: I am afraid that I do not know the reporting line. We will need to send you that.

Oliver Dowden: I can shortcut that. I am happy to commit to the Committee that I will ask it to report to me and to David Lidington as the MCO.

On your point about the difference between an annual report and this process, this process, on a random basis, selects 5%; it does not look at the totality. Going from 5% to 100% is quite a signal shift in workload.

Q6 Baroness Watkins of Tavistock: I started by wanting to ask the question

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6 The Cabinet Office has subsequently said that this should read “December”. 
that Lord Janvrin did about the reporting lines. Listening to this, it seems that this is a cultural issue. I am getting the feeling that you think this is all going fairly well, so why make more work to monitor it? I feel that this is quite important legislation that is dealt with in a light-touch way, but there is a potential danger in it becoming just a simple bureaucracy, as you said earlier, if we do not have a proper review to see that we are acting in the best interests of the development of policy and strategy. The annual report would be relatively easy to do and it would enable everybody to know, fairly succinctly, where we are. It could actually save time.

**Oliver Dowden:** On the point about it all going fairly well, I do not accept the implicit suggestion of complacency on our part.

**Baroness Watkins of Tavistock:** I was careful not to use that word.

**Oliver Dowden:** I would rather we focused our efforts on improving training and standards among civil servants, which is what we are doing through the initiatives of the Cabinet Office. Each Minister in each department is directly responsible for what goes out in their name and they should be very attentive to those standards. If we find that there is a problem with a specific department, which we may well find through the review process, we can have targeted action in relation to that department. The process for doing that is through the SROs and the responsible Ministers who are appointed.

I hope you do not feel that we are saying, “It’s all going fairly well. Let’s sit back and put our feet up”. We are saying that the better approach to this is through driving up standards. The mechanism of the monitoring board is a way of identifying that.

**John Fiennes:** It seems to me that the nature of the discussion on these boards may well change if they know that the result will be a naming and shaming or a publication of what is going on. We are trying to get an honest sharing of good practice, which is the best thing for improving standards and drawing the lessons honestly, rather than people driving defensively, so to speak.

It is worth not overemphasising the importance of the board that we have talked about. There are a number of ways that might demonstrate the improvement or not of consultation practice, and I absolutely agree with what the Minister said about this not being an issue for complacency. One of them is the dip-sampling process. Another is the work that is done to improve Civil Service capability and professionalism across Whitehall. A third is the work that my unit does and the Minister does looking at the quality of the material that comes round for agreement. Oliver Letwin talked about an ongoing role in that, and that is absolutely still happening.

In view of the decision made by Ben Gummer, it has not been a major feature of the work over the last year, but we see a very large volume of the consultations that go round. I would observe that there is a very strong connection between good policy-making, clear consultations and the consultation principles that are set out. So that absolutely carries on.
If any of those mechanisms detect a problem, the response could be quite different depending on the problem that is identified. If the problem looks like one of Civil Service skills, that is something for the policy profession properly to pick up. Alternatively, there may be issues with specific outreach. One of the things behind the principles as they were developed was that, rather than having a consultation published concretely for 12 weeks on a website that, by the way, people do not necessarily look at, you might get a faster and a better outcome if you identify more proactively the people who are most affected and go out and talk to them. There is a win all round. We have been active in building the skills for those across government.

I have one final comment on the naming and shaming. I am also relatively new in post; I arrived in October. The principles of consultation in many cases reflect quite delicate judgments about how to balance competing objectives for who you consult with, how you do it and the balance between taking your time so that everyone can get their views in in an orderly way and not denying the public the benefit of government policy if it could be made more swiftly. Those can be quite fine judgments for departments to make.

Part of what is behind the reluctance of the Cabinet Office to say, “We think X department got it wrong in that case”, is that a responsible Minister has drawn those judgments on the basis of the expert advice of officials in the line. I may look at it and say, “That seems a bit short”, or, “I do not know why they have done that”, but there may be a good reason for it. Something that is too blunt and just says, “You have to do it in XYZ way”, may leave you with a worse result and mean that you cannot get things done in an urgent way when there is support for that and it is the sensible thing to do in the circumstances.

I completely appreciate where you are coming from, but I am just pointing out that there may be effects in taking that approach.

**Baroness Finn:** “Naming and shaming” is possibly the wrong phase. Having worked extensively on the transparency agenda, my experience was that being transparent about results, whether presented via reports or otherwise, was a very good way of driving up standards. To dismiss that might be wrong.

**Baroness O'Loan:** Mr Dowden, the Lords Constitution Committee published a report in October, of which I am sure you are aware, called *The Legislative Process: Preparing Legislation for Parliament*. It quoted several witnesses to the inquiry who voiced concern about recent changes in government consultation policy. The Institute of Chartered Accountants in England and Wales, for example, noted that, “There appears to be a significant amount of evidence collecting taking place in consultations that have a short timeframe and, further, ask inappropriately open questions”. I wondered whether your office has taken note of those findings and, if you have, what has happened.
**Oliver Dowden:** Yes, I am aware of those findings. Again, there is a judgment to be made about the timing of consultations. Clearly, we need to consult for as long as necessary to reach appropriate people. I would not want us to be too prescriptive about that length. Departments know the detail of the policy, so they know who they need to reach.

My concern is less about length than about whether they are reaching the right people. Again, we have had a number of innovative measures to try to encourage a greater outreach. For example, we have the “what works” initiatives, which look at how we can effectively reach different communities. We also have things such as the Behavioural Insights Team, which can look at ways of engaging with different communities. We had quite a good response in relation to the post-Grenfell consultation process, which was organised by the Policy Lab, which was established in 2014 and provides bespoke advice to departments on running consultations. It works on around 10 projects a year.

**Baroness O’Loan:** I do not want to interrupt you, but, with respect, that is not answering my question.

There are two issues. One is the timeframe. We can understand that there may be issues that impact on the timeframe. There are also issues that make a timeframe that may appear appropriate inappropriate because of what is happening during that timeframe.

The second question was about inappropriately open questions. Have you had any analysis done of questions or any response to that at all?

**Oliver Dowden:** Open questions are something that we need to look at some more. On the timings, my view is that it is up to each department to find the appropriate timing. We will support them in the way they engage with people, and the engagement is what matters.

On the openness of questions, it is for Ministers in each department, in accordance with the principles, which refer to this, to ensure that questions are appropriate. Again, as a new Minister, I am happy to take that up.

**John Fiennes:** What is an inappropriately open question in one context may be an entirely appropriately open question in a different context. There is a spectrum. We had this report, which has been well picked over by the external body for months and months and months, and we are now minded to do what it says. The question is, “What do you think?”, or, “Are you happy?”, versus saying, “We can see that the collapse of Carillion is raising some questions about insolvency, and it looks to me like the following issues are emerging, but are those the right issues?”

If you are aiming for a very concrete, specific and quick decision on a particular issue, you should not be asking a question that sounds too blue sky. There is a continuum of documents there, and it is quite difficult to assess what is appropriate in a bright-line way.

**Baroness O’Loan:** I fully accept that, but the Institute of Chartered Accountants is a fairly powerful and very useful body in its remit and the
work that it covers. It might be useful to have a conversation with that body, for example.

**Oliver Dowden:** Yes, indeed. I very much take that on board.

Q8  
**Lord Sherbourne of Didsbury:** I have been on the Committee for just a few months, and the most striking thing to me is the range and complexity of the issues that we have to deal with. So I can see why consultation is so important, because if we do not have effective consultation we are not very well advised as to how we should be looking at some of the huge pile of regulations that come our way.

I want to explore with you the nature of the consultations that are undertaken and the perspective of the Cabinet Office in a supportive role, as you said. I have always been very suspicious of box-ticking exercises, so I was rather encouraged when, before this meeting, I discovered that two years ago Oliver Letwin had said that the Government were trying to bring about a shift from mechanical consultation towards an approach whereby departments would involve outsiders in an open policy-making process at an early stage.

Do you think that is desirable? Do you think it is happening? Has there been any reaction to the Government if they are moving in that direction?

**Oliver Dowden:** Perhaps I can update you on a few of the things that we have tried to do to achieve that. This goes back to my original point about trying to support departments and provide the education through the Cabinet Office. We have published something called the open policy-making toolkit, for example, which has had approximately 5,000 views in the past 12 months. It provides tools and techniques for policymakers to create more open and user-led policy.

We also have the policy professional core curriculum, which has training modules that cover the basics of communication and consultation principles, such as user-centred design and open policy-making.

As I said in reply to Baroness O’Loan’s question, we had quite a good example of this post the Grenfell fire, where the Policy Lab worked with what is now known as MHCLG, which used to be DCLG, to run a series of 10 events with social housing residents. Over 800 people attended the events.

It goes back to the point that what matters is engaging with the right people. That is one of the most important tests of a consultation. If a consultation is to be effective, we have to make sure that we hit the right people, particularly people who are affected by the delegated legislation in question, so that they can respond.

**Lord Sherbourne of Didsbury:** So this is being taken forward in a very positive way across government.

**Oliver Dowden:** Yes.

**Lord Sherbourne of Didsbury:** Has there been any reaction at all—good,
bad or indifferent—by stakeholders or outsiders?

**John Fiennes:** I am not aware of any negative criticism. As long as the time is there for it, most people think it is a good thing and that it makes for a richer and better policy. Like consultation itself, it is a particular skill and you need to be careful that you do not ask the same people the same question twice, neither time quite getting what you want. It is something that we are still developing.

**Q9 Lord Faulkner of Worcester:** I would like to ask about complaints and feedback. One can understand that if respondents complain about a policy decision, there is a process for dealing with that. What happens if they complain about the way the government department has handled the process? For example, perhaps it has conducted a consultation over a holiday period or over much too short a period. How would you expect the department to respond to that and do something about it?

**Oliver Dowden:** The department and the Ministers are responsible, so if things are raised with those Ministers, they should respond appropriately. It goes to the substance of people feeling that they want to feed in; there are opportunities to feed in post the consultation process and have direct engagement with Ministers.

If there is a serious concern, we can potentially, again through the responsible Minister, go back to the individual department and say, “You need to reopen this”. But that is a very high bar and we would have to be convinced that there was a very serious flaw in the process.

In addition, I would be quite cautious about creating a further appeals mechanism. When people raise complaints about the process, often they have a problem with the substance. I would not want to create yet another hoop that has to be jumped through with legislation, whereby you conduct the consultation process and then you have to be sure that it clears a further appeal from the Cabinet Office.

**Lord Faulkner of Worcester:** You would not welcome a role for the Cabinet Office as a court of last resort, then.

**Oliver Dowden:** The challenge for a court of last resort is that it is sometimes not the court of last resort but becomes the court of first resort. I certainly see it in my own constituency: when people are not happy with something, they will exhaust every avenue and often frame objections on substance by trying to find a procedural irregularity.

Again, Ministers are very much accountable for how this is conducted. Ministers have to appear before Parliament on a regular basis. They have to answer Oral and Written Questions. Frequently, the Minister who has approved the Bill or piece of legislation will appear before the Committee, and other MPs will be able to raise those concerns. I would rather those channels were used.
If specific evidence was brought to us of something that was egregious in extremis, we could advise them to go back, look at it and reopen it. But I would be very cautious about creating a formal mechanism for that.

**Q10 Lord Kirkwood of Kirkhope:** My spies tell me there might be a vote in a moment, but, first, let me set the Minister a test.

You have some SIs on the Floor of the House of Lords this evening. They are about free school meals and the threshold imposed by the Department for Education. The Children’s Society submitted responses to the consultation and I will read you three sentences of what its experience was. It found that 8,400 people submitted consultation responses following a Children’s Society campaign. While the Government acknowledged these responses, they excluded them in the analysis of the responses. Several hundred of these responses included personal testimonials about the impact of free school meals and the importance of providing these to low-income families. That is the first issue.

The second issue was the complaint that it made about the department doing the impact assessment on the basis of legacy benefits, not universal credit.

These are two substantial complaints for an instrument that is in front of us this very evening. From my experience, it is not 4% that we are dealing with; it is much more than that. Those at the Children’s Society just shrug their shoulders and think that they cannot do anything about this. They do not make complaints to Ministers. I just wondered what you would do if you were the Minister and you were confronted with that level of interest from a bona fide charity. I guess it was an email campaign. We all know that an email campaign is not the same as 8,400 handwritten letters in green ink, but you get the point. This is happening all the time.

**Oliver Dowden:** To a certain extent, this is illustrative of the conundrum that faces us. You raise the 8,400 people who had responded. As a Minister in the Cabinet Office, I have no way of telling you the reasons why those were not accepted. I could hazard a guess that maybe they did not pertain to any of the questions, so they were deemed to be inadmissible. But the Minister responsible should answer for that, and I am quite sure that, when these are debated in the Lords this afternoon, as they were debated in the Commons last week, these concerns can be raised by Peers and by Members of Parliament. Ministers are held to account for that consultation process, as they are for the basis on which they judge the impact.

The correct constitutional process is that Ministers are responsible for consultations and SIs that are put out in their department, and Ministers should be attentive as to how they are conducted. When there are concerns such as that, as a Cabinet Minister I will respond to letters from interested groups. I respond to questions from Members of Parliament who have been contacted by these interested groups, and the Ministers in question, when the legislation is going through, are responsible.

That is the better way of doing it, because otherwise, I fear, in relation to almost every consultation, legitimate concerns could be raised as to
process and a huge capacity of the Cabinet Office could be taken up on adjudicating on each one of these, when there is already a clear process of accountability to the Minister.

**Lord Kirkwood of Kirkhope:** My point to you is simpler than that. If a really organised charity such as the Children’s Society does not think it is worth complaining, we need to get the complaints process sorted out. There may well be reasons for it. I do not know what the reasons were. We need a better way of assuring that if people take the trouble to submit case studies of individual family circumstances, they are not just going to be disregarded without the ability to complain should that happen.

**Oliver Dowden:** I cannot comment on the specifics of the consultation.

**John Fiennes:** I have not seen the details of that either, I am afraid. It is not unusual to have very large numbers of respondents to issues that are as important to people as that. The Civil Service would try to present a reasonable sense of the balance of opinion, given the responses that have been made. But that is not simply a matter of how many votes we got for one thing versus how many votes we got for the other. You may get a lot more than 8,000 on other issues, where a lot of people feel very strongly about it, have registered that and shared their stories.

Equally, if you simply had a pie chart with the number of responses, that might say that 100% of people said one thing, but that would not necessarily reflect the balance of opinion on the point. That is a judgment that Ministers will have to make, and it is not a matter of weighing the one response, weighing the other and choosing the one that has the most. Ministers have to unpick and understand what the right way is, given the nature of the evidence that has been put forward.

**Q11 Baroness O’Loan:** Could I take you forward very slightly on that? When he gave evidence to us in January 2016, Sir Oliver said that feedback on consultation exercises could be: dispassionate and expert, in which case the departments should listen to it; neither dispassionate nor expert, in which case the departments could ignore it; or expert but not dispassionate, in which case departments should make a judgment.

However, there is a fourth category, and that is dispassionate but not expert. That, I suspect, is where the binning of all these personal testimonies comes from, yet that personal testimony would inform the analysis of the impact of the proposed regulation. We have seen very serious problems in the welfare reforms on the foot of this. That is the area you need to look at.

**Oliver Dowden:** That is a valid point. To a certain extent, that is what the parliamentary process is for as well. When these controversial things are debated, I have plenty of case studies from people in my own constituency who will raise the impact with me. As parliamentarians in both Houses, we then represent that as part of the process. Sadly, I was not in the debate when our House considered it but I am quite sure that many case studies would have been raised.
Baroness O'Loan: The problem you have is that most of these Statutory Instruments are never debated in your House. Some of them are debated in our House and people raise them but, for the most part, they are not. There is no debating, so the consultation process is critical and the voice of those who are dispassionate but not expert must be listened to.

The Chairman: We are going to have a Division in the House of Lords shortly. We have concentrated our questioning this afternoon on the consultation process.

The other issue about which we have equal concern is the preparation of the Explanatory Memoranda. That does not always acquire quite the same profile as the consultation process, whereas quite often, when we represent to a department a problem with an Explanatory Memorandum, it is quickly withdrawn and another one submitted, which we welcome.

Lady Watkins’ question is next on our list. I am anxious that it should not be too interrupted by the Division, which is coming very shortly. Let us hope for the best.

Q12 Baroness Watkins of Tavistock: I will be very quick. You have had pre-sight of these questions. Oliver Letwin was asked whether departments should consider reopening a consultation where legitimate stakeholders were not involved in expressing a view before the consultation was closed. You have given a rather good example with the Children’s Society. Has the Cabinet Office given further thought to when a closed consultation might need to be reopened?

Oliver Dowden: As I said, it is principally for the individual department and the Minister to consider the circumstances of the situation and the nature of the response, because they have both the policy expertise and the legal accountability for it. As I said in my answer to a previous question, I think from Lord Faulkner, I am very cautious as to whether we want the Cabinet Office to create a new further test. But, once the consultation has closed, if this is drawn to our attention and we really feel it is a major problem, we have the option to write and meet with Ministers as part of the role we have in supporting it. But I am very cautious about having a formalised process, because I can just see that before long every consultation will end up being challenged on the procedural ground.

Baroness Watkins of Tavistock: If you have that right, have you any feeling at all about how often you would do that?

Oliver Dowden: It has not happened so far as a new Minister. I was appointed in January, so it is probably a little too soon for me to be able to advise you one way or the other.

Baroness Watkins of Tavistock: It is interesting, if I may say so, that you do not have any historical data. I have spent 40 years in the health service. I would expect to be able to look back to inform tomorrow.

Oliver Dowden: The problem is that it is very much a judgment call. These are quite subjective so taking a subjective analysis—I am conscious of the
Division bell ringing—and trying to put it into objective statistics is slightly challenging.

The Committee suspended for a Division in the House.

Q13 **Lord Janvrin:** Minister, you have answered the first question that I was going to ask, which is about the workshops and training, et cetera, which is very important.

On the consultation principles, has interaction between the Cabinet Office and the departments prompted any reconsideration of the principles themselves? Is there a review procedure? Is it something that you will “keep under review”?

**Oliver Dowden:** Yes, it is certainly something that I will keep under review. As I said at the beginning of this session, we have now put up the revised principles online. I will reflect on this session and any other further information I receive, and if I believe there is a need to update them, I can initiate a process for updating them. But I feel as if I am surrounded by experts here, so if the Committee feels that there are things that should be changed in relation to the principles, I would like us to have an ongoing dialogue, and I would be very happy to listen to any recommendations that you make.

**The Chairman:** You may regret having said that.

**Oliver Dowden:** Perhaps it can be done in a formalised process through the Chair.

Q14 **Lord Haskel:** This is the Brexit question, Minister. There will be an awful lot more work with Brexit. We are expecting between 700 and 1,000 SIs. It says here that Defra is taking on 1,200 additional civil servants, which staggers me. Anyway, can you confirm that the principle of consultation will continue in view of all this extra work, and are you prepared for it?

**Oliver Dowden:** Yes, I can confirm that the principle of consultation will continue. I am just looking through my notes, because in advance of this I asked to see guidance that had been issued by DExEU, and that guidance sets out principles for how this process is conducted but makes explicit reference in the first paragraph to the principles we have been discussing and says that those must be heeded.

In terms of how the machinery of government is working in respect of this, DExEU is the lead department, particularly through Ministers such as Steve Baker, who is responsible for implementation on the Brexit side. They are ensuring that there is a process of scrutiny and that we lay the SIs in the correct order in order to achieve the policy objectives that the Government have set out in respect of Brexit.

But, as I said, the beginning of paragraph 1 makes reference to these principles. We would not expect Brexit to be used as an excuse for any change to the standards that we expect from Statutory Instruments.

**Lord Haskel:** Are you satisfied that the Cabinet Office has enough
resources to supervise all this additional work?

**Oliver Dowden:** It goes back to our original conversation. Principal responsibility lies with the individual departments. Each department will have to increase the amount of resources it has to deal with this. As you know, the Chancellor has made provision for additional spending, some of which will be used for this sort of thing. I believe the allocations will be made later this year. DExEU is the co-ordinating department for ensuring that the multiplicity of SIs are organised in an effective fashion. The role of the Cabinet Office will be the same as in relation to all other SIs in the way that we have discussed previously.

**The Chairman:** Thank you very much. That is the end of our formal questions. There are no final supplementary questions from colleagues. Is there anything that you would like to say that has not emerged already?

**Oliver Dowden:** No, we have covered it very well.

**The Chairman:** We are enormously grateful to you and to your colleague, Mr Fiennes. Thank you very much indeed for coming.